IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1279.

JOHN M. DAVIES AND ROBERT K. DAVIES, PLAINTIFFS IN ERROR,

vs.

CHARLES E. MILLER AND DANIEL G. ROLLINS, EXECUTORS OF CHESTER A. ARTHUR, DECEASED, LATE COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFFS IN ERROR.

EDWIN B. SMITH,
STEPHEN G. CLARKE,
Of Counsel for Plaintiffs in Error.

BURGOYNE QUICK PRINTING CO., COR. WALKER AND CENTRE, N. Y.

IN THE

Supreme Court of the United States.

JOHN M. DAVIES and ROBERT K. DAVIES, Plaintiffs in Error, vs. CHARLES E. MILLER and DANIEL G. ROLLINS, Executors of Chester A. Arthur, deceased, late Collector of the Port of New York, Defendants in Error.	Oct. T., 1888. No. 1279.

BRIEF IN BEHALF OF PLAINTIFFS IN ERROR.

Statement.

The plaintiffs, in the months of July, August and September, 1873, imported certain shirts, drawers and stockings made on frames, the duty upon which, under decisions of this Court made since that date, was but 35% *ad valorem*. A greater rate of duty was exacted by the then Collector, against whose executors this suit is now prosecuted.

The main question presented for consideration here is the contention of the counsel for defendants in error

that, under Sec. 2931 of the Revised Statutes, the "notice in writing of dissatisfaction," hereafter referred to as the protest, must be given to the collector by physical lodgment of the paper with him not before but *after* and at some period of time *within* ten days after the entry to which it applies has been formally liquidated.

What this formal liquidation is and the time from which the ten days under the contention of counsel for defendants in error begins to run, appears from the testimony to be found on pages 29-31 of the record.

The contention of the plaintiffs in error was and is, that a protest made at any time after entry and before the expiration of ten days from the date of final liquidation, is a compliance with the statute.

Further, that the statute for many years has received this construction by officers charged with its execution; and that the uniform practice, in accordance with such construction, should be now controlling.

With this view plaintiffs introduced the testimony hereafter set forth; and I ask the Court to read such testimony with reference to this contention of the plaintiffs in error.

Plaintiffs then offered in evidence seven protests applicable to the entries in evidence; to the admission of which counsel for the defendants objected on the ground that the protests were filed with the Collector prior to the date of liquidation as stamped upon the entry. Whereupon the Judge said:

"In order to enable the plaintiffs to properly present *his* side of the case I shall admit this now, giving the defendants an exception, and rule upon the effect of the protest hereafter. That will save all your rights."

Plaintiffs then read in evidence a report from the Custom House as to one of the protests and appeals, and the reply of the Department in respect thereto as follows:

CUSTOM HOUSE, NEW YORK,
COLLECTOR'S OFFICE, Oct. 30, 1873.

SIR—I submit the appeal of Messrs. J. M. Davies (No. 12195) from the decision of this office assessing duty at the rate of 50 cents per pound and 35% ad val., less 10%, on certain worsted cuffs imported by that firm, per Java, July 31, 1873. The app'r returns the goods knit goods, woolen hosiery, value over 80 cents per lb.

Referring to section 2 of the act of March 2, 1867, and Treasury decision October 26, 1869, *I have the honor to report that the requirements of the 14th and 15th sections of the act approved June 30, 1864, have been complied with by the appellees.*

The appeal is enclosed herewith; also protest.

Very respectfully, your obedient servant,

C. P. CLINCH,
Ass't Collector.

Hon. Wm. A. Richardson, Secretary of the Treasury.

And the reply of the Department affirming the decision of the Collector as follows:

"TREASURY DEPARTMENT,
WASHINGTON, D. C., November 3, 1873.

SIR—Messrs. J. M. Davies & Co. have appealed (941–B) from your assessment of duty at 50 cents per pound and 35% *ad valorem*, less 10%, on certain worsted cuffs imported by them per Java, July 31, 1873. It appears from the report upon the appraiser's return that the goods were knit goods, woolen hosiery, value over 80 cents per pound. Duty was assessed thereon as above under the provisions of section 2 of the act of March 2, 1867, and Department decision of October 26, 1860. Your decision is hereby affirmed.

Very respectfully,
J. F. HARTLEY.

By order of Secretary of the Treasury.

C. A. Arthur, Esq., Collector, New York." (Record, pp. 9, 10).

A similar report and reply as to each of the other protests and appeals was then read in evidence (Record, fol. 19).

It further appeared in evidence by the testimony of a Custom House broker since 1863, at the port of New York, a part of whose business it was to file protests, where required, that since the passage of the Act of 1864 there was no difference in the practice as to protests being filed before or within ten days after liquidation; that he never knew a protest rejected by the Custom House or Treasury Department as out of time because filed before liquidation. If a protest is deemed out of time by the Department the appeal as a rule was not entertained (Record, fol. 26).

Also by the testimony of Edward Jordan as follows:

"From 1861 to 1869 I was solicitor of the Treasury of the United States. The practice was, from 1864 and as long as I remained connected with the department, to recognize the validity or the timeliness of protests made at any time before the liquidation of the entries as well as if made after liquidation and within ten days after it" (Record, fol. 32).

And on his cross-examination he stated that he drafted the bill of 1864 (*Ib.*).

Also by the testimony of the Deputy Collector in the New York Custom House having charge of the Bureau of Protests and Appeals, that the same practice as Mr. Jordan had testified to, continued from 1869 to 1872; he testified:

"When I entered the Custom House and during the time I was Deputy Collector it was the practice, not only by the officers of the Custom House in New York, but by the Treasury Department, as evidenced by their action upon protests, to regard protests filed at any time after the date of the entry up to ten days after liquidation of that entry, as stamped upon it, as being filed within the time required by the Act of 1864" (Record, fol. 53).

This evidence was supplemented by the succeeding Deputy Collector who testified:

"I was Deputy Collector of Customs in charge of the law division of the Custom House from July 5, 1872, to March 1, 1879. That department had charge of the protests and appeals and of everything connected with the law and seizure. The refund statements went through my division under my supervision. It was a part of my official duty to pass upon the sufficiency of protests and appeals; was familiar with the action and practice of the Custom House and Treasury Department with respect to the question of whether protests filed before liquidation were in time or not. In 1872 and down to the fall of 1873 protests were treated as valid if they were filed at any time subsequent to entry and prior to a date ten days after liquidation, and that was the practice at the time I entered the Custom House" (Record, fol. 28).

Also from the evidence of Mr. Lydecker, a Chief Clerk, Deputy Collector and Special Deputy in the Custom House from 1854 until 1880; that from June 30, 1864, to September, 1873, the practice of the Custom House was, that protests were regarded as filed in time if filed after the making of the entry at any time up to ten days after the liquidation of an entry, and he had no recollection of the discontinuance of that rule so long as he remained in the Custom House (Record, fol. 42).

Also from the testimony of Mr. Evans, originally given in 1878, as follows:

"I am and have been for about twenty years liquidator in the Custom House, and am familiar with the entire course of the business in the Custom House in respect to these entries. The protest and appeals are received by me from the 7th division. We then have the entries got up, and the entries are endorsed with the number of the appeal and the date and also the date of the protest. A letter is then written on a sheet, which is in part printed, the form prescribed by the

Secretary of the Treasury. The letter, the protest, and the appeal are sent by me to the auditor, who checks the letter and the protest and the appeal, and the whole are then sent to the Collector, and from his office they are transmitted to the Department. I should say from one-third to one-half of the protests and appeals for the last ten years were filed in the Custom House prior to the date of the stamp of liquidation upon the back of the entry. I don't think there have been as many lodged prior to liquidation as after, but a very great many—a very large per cent. If the protest and appeal was filed prior to ten days after date of the stamp upon the back of the entry it was uniformly regarded as in time. All the appeals and protests passed through my hands. Ordinarily the entries had been liquidated when I transmitted the protest and appeal, and there have been some cases where the protest and appeal have been forwarded prior to liquidation, but those were exceptional cases" (Record, fols. 35, 36). And by the testimony of Mr. Stanwood, as follows:

"I am a custom house clerk, and have been employed in the custom house since October, 1875. For the first three years I was a clerk and copyist, and after that I was a refund clerk and had charge of the preparation of refund statements. The statements are prepared in the collector's office and forwarded by him to the Secretary of the Treasury and there examined and the money called for, and the money that the Secretary finds to be called for is transmitted to the collector for payment to the claimant. In the course of preparing refund statements, I think I have included a good many entries where the protests had been filed prior to September, 1873, and certified statements where the protests were before liquidation. These refund statements always contained the date of the filing of the protest and the date of the liquidation of the entry. I never knew a statement not to be paid upon the ground that the protest was made before liquidation. Protests before liquidation were always treated by me as valid in making up statements until a decision, which was made in 1878 by Chief Justice WAITE, that a protest before liquidation was not good. For a time after that all protests filed before liquidation the appeals were sent to Washington and the answer came back always, "Not entertained." The appeal was not entertained on

account of the instruction contained here, and during that time no entry was included in the statement where a protest was made before liquidation. This was in accordance with circular dated September 30, 1878. After that circular was issued in 1878 there was another circular of instructions issued referring to No. 3730 received at the Custom House.

This circular was then read in evidence:

"TREASURY DEPARTMENT, *July* 8, 1879.

SIR: In decision 3730, dated Sept. 30, 1878, the Department adopted a ruling of the Circuit Court at New York in the case of the U. S. *vs.* Watt *et al.*, in which it was held that protests and appeals filed under Section 2931 of the R. S. must be so filed within the statutory time after the final liquidation of the duties, and that such documents filed before the completion of such final liquidation were to be regarded as premature, and therefore not valid. This ruling of the Court was in contravention of the practice at your port and at all the other prominent ports of the U. S. under which protests and appeals had been recognized both by the customs officers and by this Department as valid if filed at any time before the expiration of the time mentioned in the section of law cited.

Since the decision in the case of Watt against the U. S. was made the case of Keyser against Arthur has been tried at the portof N. Y., which involved questions connected with the liquidation of entries and the filing of protests and appeals therefrom. In the case of Watt against the U. S. it seems to have been assumed by the Court that the liquidation of an entry was one single act complete at a definite time and not a successive series of acts on the part of the various customs officers, as is the case, and in the case of Keyser against Arthur it was held that a protest filed after the first liquidation of the entry as to the rate of duties is to be regarded as valid, although the final liquidation as to the amount to be exacted may not be perfected until afterwards. These decisions of the courts are radically in conflict with each other. Difficulties have been experienced in administering the law as laid down in the case of Watt against the U. S., and the effect of that decision would be to invalidate protests and appeals which were filed long before such decision was made, and before the date of final liquidation

of the entry, which had at the time been accepted by this Department as valid. In view of the conflicting opinions of the courts upon this question and the long-established practice of this Department in accepting protests and appeals filed at or before the liquidation of the entry, the Department decides to adminster the law upon the basis of its former practice until a decision of the Supreme Court shall be had upon the question.

It is therefore ordered, that protests and appeals filed at any time prior to the expiration of the ten and thirty days, respectively, specified in Section 2931 of the R. S. are to be regarded by custom officers and this Department as complying with the requirements of the law as to time.

By order:

Very respectively,
H. F. FRENCH,
Assistant Secretary.

Collector of Customs, N. Y."

After receipt of these instructions the same practice was resumed of including in the statements entries where the protests had been filed before liquidation, and the statements were sent to Washington and paid by the Department. Those entries that had been suspended or had not been included in the statements which were sent from some time in 1878 until July, 1879, were marked "Appeal not entertained," but, notwithstanding that, they would put in certified statements, and the Department's attention being called to why they were not entertained, they were paid the same as the rest" (Record, pp. 19–21).

This evidence was supplemented by that of Mr. Northup, a clerk in the Custom House between 1867 and 1881, having charge of the protest and appeal department, who testified:

"It was my duty to receive and record protests and appeals; receive the summonses for the collector and record them and send them to the district attorneys. Along about April, 1879, I reported on all the protests and appeals to Washington. Both copies of the protests were stamped together at the time they were received; the second copy of the protest was forwarded

with the appeal to Washington. I also examined certified statements for refunds in cases where protests and appeals had been made. The statement gave the title of the suit, the number of the suit, the merchandise on which the refund was made, the date of payment, the name of the vessel, where from, the date of liquidation, the date of protest, the date of the appeal, the number of the appeal, the amount paid, the excess of duties, the amount of interest, and the date of the Secretary's decision on the appeal, if there had been any. These particulars were carried through from each importation embraced in the respective statements during the time I was in office. In practice there was no distinction made by the officers of the customs as to protests being filed in time, as to whether it was filed before or after the date of the liquidation stamped on the entry" (Record page 10.)

He also testified as a matter of fact that between 1867 and the fall of 1873 a large number of protests were filed before liquidation. That, as a rule, where protest was filed after liquidation there had been some change in the duty from the original liquidation (Record, fol. 22).

Mr. Hart, a Custom House broker, testified that the practice from June, 1864, to September, 1873, was uniform; that protests were filed at any time it was convenient to do so prior to liquidation or within ten days after liquidation. Witness never knew of an appeal based upon such protest being rejected by the Department (Record, fol. 31).

Mr. Bleidorn, another broker, confirmed this statement (Record, fol. 32).

As did also Mr. Coughtry (Record, fol. 34), and Mr. Curie (Record, fols. 53 and 54).

The official action of the Treasury Department is further evidenced by the regulations and circulars of the Department, to be found on pages 22, 23, 24, bottom of page 26, page 27 of the Record,

Assignments of Errors.

Plaintiffs in error asssign the following errors:

1st. The refusal of the Court to direct a verdict for the plaintiffs.

2d. The direction of the Court to find a verdict for the defendant upon each entry (Record fol. 75).

3d. The ruling of the Court excluding testimony as to the practice in respect to protests filed before liquidation subseqent to September 11, 1873, viz.:

Witness was then asked if the same practice continued until the fall of 1873.

Counsel for defendants objected, and the Court sustained the objection, so far as it called for testimony as to practice subsequent to September 11, 1873 (Record, fol. 20).

I was a clerk at the Custom House in this city, in the Collector's office, between December, 1884, and August, 1886, in the protest and file room, engaged in the receipt, stamping, recording and filing of protests and appeals, and in the examination of entries and invoices in connection with them, and reporting on the same to the Collector.

Witness was then asked if he was able to state, during the time he had testified to, what the practice was in reference to protests filed before liquidation being treated in the Custom House and by the department as filed in time.

Counsel for defendants objected to the question as immaterial. The Court sustained the objection, and plaintiffs' counsel duly excepted, and the exception was allowed (Record, fols. 24 and 25).

Witness was then asked, having stated what the practice was as to protests being filed before or within

ten days after liquidation from 1864 to 1873, what the practice was from 1873 down to 1878.

Counsel for the defendants objected to the question as immaterial, and the Court excluded the question, and plaintiffs, by their counsel duly excepted, and the exception was allowed (Record, fol. 26).

Witness was then asked to state whether or not there was any change in that practice from the fall of 1873 down to the comencement of the year 1878. To this question defendants' counsel objected as immaterial and incompetent. The Court sustained the objection and plaintiffs' counsel excepted, and the exception was duly allowed (Record, fol. 28).

September 11, 1873, was the latest date of the entries in the present suit.

4th. The exclusion of testimony as to the particular practice of the office of Webster & Craig. The testimony upon which this error arises is as follows:

"I am an attorney at law. From the beginning of 1862 to 1873, I was managing attorney in the office of Webster & Craig. Claims against the Government in which protests were required to be filed at the Custom House was their principal business. They did a very large business.

"Witness was then asked if he was able to state what proportion of protests that were filed at the Custom House in the years 1864 to 1873, were filed from the office of Webster & Craig. To this question defendants' counsel objected as immaterial, the Court sustained the objection, and plaintiffs' counsel excepted, and the exception was allowed.

"Witness then testified that the protests which were filed in the years 1864 to 1873 were prepared under his supervision; that the practice at the Custom House during those years was to accept protests filed before the date stamped on the entry. He then stated that the above testimony was only in reference to practice in their own office.

"Defendants' counsel then made a motion to strike out the above testimony as immaterial, the Court granted

the motion, and plaintiff's counsel excepted, and the exception was allowed.

" Witness was then asked to state what the practice was as to protests filed from his office. Defendants' counsel objected to the question as immaterial, the Court sustained the objection, and plaintiffs' counsel excepted, and the exception was allowed " (Record, pp. 17, 18).

5th. The exclusion by the Court of testimony as to proportion of protests filed by different parties prior to liquidation, viz.:

Witness was then asked to state what proportion of protests he had filed before liquidation. Defendants' counsel objected to the question as incompetent and immaterial, the Court sustained the objection, and plaintiffs' counsel duly excepted, and the exception was allowed (Record, fol. 31).

Witness was then asked to state what proportion of the protests filed by himself in behalf of his customers were filed before liquidation. Defendants' counsel objected to the question as immaterial, the Court sustained the objection and plaintiffs' counsel duly excepted, and the exception was allowed (Record, fol. 33).

Witness was then asked to state what proportion of the protests filed by the office of Webster & Craig from 1864 to 1873 were filed prior to the liquidation of the entry. Defendants' counsel objected to the question as immaterial, the Court sustained the objection, and plaintiffs' counsel duly excepted, and the exception was allowed (Record, fol. 34).

Witness was then asked, having first stated that he was able to answer, to state what proportion of such protests were filed by his office before liquidation of the entry. Defendants' counsel objected to the question as immaterial, the Court sustained the objection, and plaintiffs' counsel duly excepted, and the exception was allowed (Record, fol. 35).

Witness was then asked to state what proportion of the protests he filed were filed before liquidation

To this question defendants' counsel objected as immaterial, the Court sustained the objection, and plaintiffs' counsel duly excepted, and the exception was allowed (Record, fol. 53).

I am an attorney at law; for the past few weeks I have examined some thirty or forty cases upon the calendar of this Court with a view to the preparation for trial and of ascertaining whether the protests were filed before or after liquidation; have examined the original protests and entries in the District Attorney's office and can state very nearly the number of protests that were filed before liquidation in those cases.

Witness was then asked to state the number that were filed before liquidation.

Defendants' counsel objected to the question as immaterial. The Court sustained the objection, and plaintiffs' counsel excepted, and the exception was allowed (Record, fol. 58).

ARGUMENT.

I.

The first two errors assigned present practically the same question, viz.:

The construction of Section 2931 of the Revised Statutes as to the time when the physical act of lodging a protest must be done to enable an importer to maintain an action against a collector who has exacted an unlawful amount of duty.

That section is as follows, the material portions being italicized :

SEC. 2931. On the entry of any vessel, or of any merchandise, the decision of the Collector of Customs at the port of importation and entry, as to the rate and amount of duties to be paid on the tonnage of such vessel or on such merchandise, and the dutiable costs and charges thereon, shall be final and conclusive against all persons interested therein, unless the owner, master, commander, or consignee of such vessel, in the case of duties levied on tonnage, or the owner, importer, consignee or agent of the merchandise, in the case of duties levied on merchandise, or the costs and charges thereon, *shall, within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, as well in cases of merchandise entered in bond as for consumption, give notice in writing to the Collector* ON EACH ENTRY, *if dissatisfied with his decision*, setting forth therein, distinctly and specifically, the grounds of his objection thereto, and shall, within thirty days after the date of such ascertainment and liquidation, appeal therefrom to the Secretary of the Treasury. The decision of the Secretary on such appeal shall be final and conclusive, and such vessel, or merchandise, or costs and charges, shall be liable to duty accordingly, unless suit shall be brought within ninety days after the decision of the Secretary of the Treasury on such appeal for any duties which shall have been paid before the date of such decision on such vessel, or on such mer-

chandise, or costs or charges, or within ninety days after the payment of duties paid after the decision of the Secretary. No suit shall be maintained in any court for the recovery of any duties alleged to have been erroneously or illegally exacted, until the decision of the Secretary of the Treasury shall have been first had on such appeal, unless the decision of the Secretary shall be delayed more than ninety days from the date of such appeal, in case of an entry at any port east of the Rocky Mountains, or more than five months in case of an entry west of those mountains.

We submit, then—

1. That under the foregoing section a protest made and filed at any time after entry of the merchandise and a period not later than ten days after the liquidation of said entry is in time.

That the expiration of the term of ten days next after liquidation completed, without any notice to the Collector of dissatisfaction with his action, operates as a statutory bar to the recovery of any part of the duties exacted is indisputable; but the question is whether there is any legal objection to an importer signifying his dissatisfaction with the classification for duty, and corresponding rate—the whole basis of the ascertainment—before the mere clerical work of computation has been so completed as to indicate the precise sum in dollars and cents that is to be paid; *this notice* so given *remaining with the Collector*, as applicable to the course by him pursued with reference to a designated entry *during the whole of said statutory term*. The statute plainly declares the *termination* of the period during which an importer can signify his objections to the Collector; but the *commencement* of this term is not so expressly prescribed by R. S., Sec. 2931.

The *entry* of the goods is the *terminus a quo* in regard to the Collector's action, and the importer's signification of dissatisfaction therewith so far as this section is concerned. Omitting those words relating to tonnage dues

and to charges, it declares that " on the *entry* of any merchandise the decision of the Collector as to the *rate* and amount of duties to be paid shall be final and conclusive, * * * unless the owner or importer shall, within ten days after the ascertainment and liquidation of the duties, * * * give notice in writing to the Collector *on each entry*, if dissatisfied with his decision," etc. (see *supra*).

The *rate* determined upon *substantially* determines the amount to be paid; although some clerical computation may be required to be done. The *rate* is established by the collector's decision, which necessarily must precede the clerical application of it to the invoices comprised in the entry. If it be (as in our case, and in almost, if not quite, every case), the decision of the collector as to the *rate* with which the importer is dissatisfied, why should he not be permitted to signify this dissatisfaction, and the grounds of it, to the collector just so soon as the latter makes known his decision? No real *reason* can be suggested why he should postpone giving such notice of dissatisfaction with what the collector *has decided* until after some subordinate has completed some clerical computation, which *must* be made upon the basis of, and in conformity with, the collector's decision. It can easily be seen that a prompt statement of the objections made to the adoption of the rate declared by the collector might sometimes be highly beneficial, and prevent useless labor, expense and delay; but no motive can be assigned for requiring delay after a determination has been announced which causes dissatisfaction.

The Act of June 30, 1864, C. 171, Sec. 14 (13 Stat., 214–5), now reproduced in the revision as Sec. 2931, first required the notice of dissatisfaction to be " upon each entry." No such requirement existed in precedent legislation. Accordingly, construing earlier acts, this Court and the Circuit Courts held that a protest

might be made prospectively, to cover goods subsequently imported.

Brune vs. Marriott, Taney, 132.

Of this decision it was said by BETTS, J., in following it:

"Nothing has since transpired in that Court recalling the decision then made, and, in this Circuit, it has since been regarded and acted upon as laying down the true rule."

Steegman vs. Maxwell, 3 Blatch., 367, bot.

This principle was applied by SMALLEY, J., to a notice of dissatisfaction under the fifth Section of the Act of March 3, 1857, c. 98 (11 Stats., 195), the phraseology of which is similar, as to the time of giving such notice, to that of R. S., Sec. 2931, except that it says "after entry," and also except it has not the phrase, added in 1864, "upon each entry"—in regard to which a few observations will be presently added.

Hutton vs. Schell, 6 Blatch, 54, 55,

citing the then recent, unreported case of Fowler vs. Redfield, decided by Judge NELSON.

It must be noticed, however, that the Act of 1857, Sec. 5, relates only to the exaction of duty upon goods claimed to be *free* (92 U. S., 453), so the claim of duty must be made when they were entered, and no question of dissatisfaction with the decision as to *rate* could arise under it; and, to this extent, the present statute is stronger in favor of our contention. It made the time run from the date when duty was claimed.

Blatchford, J., also held the rule to be the same under both revenue acts, and regardless of the mere change in the person of the collector.

Wetter vs. Schell, 11 Blatch., 193.

Where the opinion commences with the declaration that "the question must be regarded as settled in this district," and closes by referring to another unreported

decision by Judge NELSON (Choteau vs. Redfield), which "has been followed and applied in many cases since," and Judge BLATCHFORD declares he is satisfied it is correct (*Ib.*, 197.)

If it were correctly held that this Act of 1864, § 14 (by the requirement of a notice "upon each entry") precluded the continuance of the practice of protesting in advance of the entry, yet this phrase could not, of itself, have the effect of delaying the giving of notice beyond the time of entry—certainly not beyond the announcement of a decision applicable to each entry.

If, prior to this Act, it were permissible to file a protest before importation, the same reasoning entitles the merchant now to file it immediately upon entering the goods; certainly, so soon as the Collector's decision fixes the rate. This will be seen by a comparison of the several decisions, giving judicial construction to the statutes, and above cited.

In the first case calling for a construction of this Act of 1864 (now R. S., § 2931) Judge WOODRUFF declares that he lays no stress upon any *other* change of phraseology, to prevent prospective or continuing protests, relating to future importations, than the insertion of the words "on each entry:"

"Had there been no change in the law other than from the words 'within ten days after such entry" to 'within ten days after the ascertainment and liquidation' *it would be difficult to withdraw the present case from the operation of the decisions I have mentioned.* The Act does not stop with that change. It provides that such notice shall be given 'on each entry.' * * * The reading which alone gives meaning and effect to those words is that, in all cases, whether of entry in bond or for consumption, the owner shall give notice in writing on each entry to the Collector, etc., not meaning on the paper or record called the entry, but *in respect of each entry.* This gives meaning and effect to all the language of the section, and it serves a very important purpose."

Ullman vs. Murphy, 11 Blatch., 358, 360.

The Courts having held that the phrase "within ten days *after* such entry," in the Act of 1857 did not preclude a merchant from signifying his dissatisfaction prospectively (even to a prior collector) any length of time *before* such entry, it necessarily follows that the language of R. S., Sec., 2931, "within ten days *after* the ascertainment," etc., does not forbid a notice of dissatisfaction being given *before* liquidation. Hence, Judge WOODRUFF places the invalidity of prospective protests—relating to goods not yet *in esse*—upon the other phrase of the Statute of 1864. In other words, so far as the only language affecting the present issue is concerned, the Courts held that dissatisfaction could not be effectively notified more than ten days *after* entry or liquidation, but *might be any time before*, whenever it actually arose.

The effect of the Act of 1864, § 14, as construed by Judge WOODRUFF, was to say that the notice could not be given more than ten days *after* liquidation nor *before the entry*, because it must relate to, or be "on such entry."

From the record and the (July 8, 1879) circular of the Treasury Department (Rec., p. 20), it would naturally be supposed that the late Chief-Justice decided in U. S. vs. Watt, 15 Blatch., 29, that a protest could, legally and effectively, only be filed *after* liquidation. The Court might be surprised, upon examining the report of his decision, to find *he did not touch this question at all*, were it not that this Court has already declared the true ground of that decision (120 U. S., 114). He *only* ruled that a merchant could not *appeal* until after the final action of the collector upon his importations.

U. S. vs. Schlessinger, 120 U. S., 114.

Exceptions can be noted as a cause progresses, but an appeal is from the final action of the tribunal.

Upon the main point ruled in the Watt case—the conclusiveness of the liquidation—it was expressly overruled here, the C.-J. concurring.

U. S. vs. Schlessinger, 120 U. S., 114.

The construction for which we contend is in harmony with the character and purpose of the document to which it relates. In common parlance, and even in judicial opinions, the instrument is frequently called a "protest;" nevertheless, it is worthy of observation that the statute, avoiding all appearance of legal technicality, does not so designate it. It is *not* a protest against a payment or exaction, but a "*notice* of dissatisfaction" with a decision. Hence, it is to the decision to which it relates that we must refer as indicating the proper time and occasion for giving such notice. A protest is simply to indicate that a payment is not voluntary. It usually accompanies the enforcement of process like an execution or a tax warrant; while "notice of dissatisfaction" may be as to a ruling upon a matter still *in fieri*. The statute requires "the grounds of his objections" to be specifically stated, that the action *so* objected to may be accordingly modified or reversed. A protest is solely for the benefit of the protestant, to show the state of his will, and that he will reclaim the property taken from him.

Wright vs. Blakeslee, 101 U. S., 179, top.

The mercantile and informal nature of the paper was noted by Chief-Justice TANEY in the Circuit decision afterward affirmed by this Court:

"The object of the protest is merely to give notice to the officer of the Government that the importer means to claim the reduction, and to make known the grounds upon which he makes the claim."

Brune vs. Marriott, Taney, 144, mid.

The "notice of dissatisfaction," and its grounds are (partly), that the *collector* may change the unsatisfactory

ruling ; a protest, literally, contemplates nothing of the kind.

Davies vs. Arthur, 96 U. S., 151.
Burgess vs. Converse, 2 Curt., 223.

The statute does not say the notice of dissatisfaction is to be given *in* ten days after, but "*within*" ten days after, the ascertainment of the duty. That is, it cannot be done *later* than that. It does not designate a specific time at which it must be done, but a date "after" which it cannot be done.

"When time is spoken of, any act is within the time named that does not extend beyond it."

Sanborn vs. Ins. Co., 16 Gray, 455.

Accordingly, the same Court held, under a statute requiring a lien to be filed "*within* four days from the time such ship or vessel shall depart from the port," &c., that the certificate could be filed *before* her departure.

Young vs. Orpheus, 119 Mass., 179.

GRAY, C. J., said, answering this point:

"5. The provision that the certificate shall be filed 'within four days from the time' of her departure, allows it to be filed *at any time before the expiration of the four days.* WHETHER IT WAS FILED BEFORE OR AFTER THE BEGINNING OF THE FOUR DAYS IS IMMATERIAL."

119 Mass., 185, bottom.

A widow is bound, in that State, by her husband's testamentary provisions for her, unless she waive them "*within* six months *after* the probate of the will." A widow filed her waiver, and died *before* the will was probated; *held*, a good waiver.

Atherton vs. Corliss, 101 Mass., 40.
Pinkerton vs. Sargent, 102 *Id.*, 571.

In Alabama, a statute required claims against an in-

solvent estate to be filed in the Probate Office "*within* nine months *after* such declaration" of insolvency: *held*, that a claim so filed *before* the adjudication of insolvency was entitled to allowance, as a compliance with the statute.

Levert vs. Read, 54 Ala., 530,

where the Court overrule an earlier case, 46 Ala., 634, and in lieu of their own opinion in that former case, adopt the argument of the appellant's counsel" therein, that argument being appended to the opinion, and being (substantially) ours in part, viz., the "reason of the rule," the intent of the law-maker, and asking:

"Can the law require the useless formality of taking this claim off the file, and again putting it back on the file? Or of taking it off the docket, when it was regularly docketed, and putting it on again?

But it is said that this claim was not called to the attention of the Judge *after* the estate was declared insolvent. The claim was in his custody, *filed* by him, and it was *by the Judge* placed on the docket of claims against this estate, with the name of the claimant, the date, amount and nature of the claim, and it so continued in the custody of the Judge and on the docket during all of the nine months.

The spirit and meaning of the law seems to be that the persons having claims against insolvent estates shall be allowed all the time from the grant of letters until nine months after the declaration of insolvency, to file their claims, but no more.

If the Court will co sider the meaning of the word "*within*," as used in this statute, it is obviously intended to operate merely as a statute of limitation, and limits the time *beyond* which claims shall not be filed. The appellee would limit the meaning of the word "within" to its most literal and limited sense. Mr. Webster's first definition of this word is, "In the inner part;" his second definition is, "In the limit or compass of, *not beyond*, use of time or place;" his fifth definition is, "Not later than." The first or primitive meaning would not make any sense in this statute. But "not beyond," "not later than," clearly defines the

intent of the lawmakers; which was to fix a time after which claims could not be filed.

Leveret vs. Read, 54 Ala., 530-1,

Citing, as analogous, Norville vs. Williams, 35 Ala., 551,
in which the Opinion thus concludes:

"4th. We adopt this principle the more readily, because we are satisfied we thereby approve a practice which has obtained largely with the profession; and the opposite construction could not fail to work much individual oppression."

Thus the Connecticut Court, construing the word "after," say it must be variously so interpreted as to save the right or estate.

Sands vs. Lyon, 18 Conn., 19, 27.

This is the common construction of statutes of limitation; that an action must be brought within six years after the cause accrues, etc. Suit can be instituted the moment a complete right arises, or on any juridical day of the six years ensuing.

Blackman vs. Nearing, 43 Conn., 56.
and cases *passim*.

So we can give notice of our dissatisfaction with the collector's decision as to a rate, etc., so soon as we are informed of it, and any day thereafter until the period of ten days after liquidation has elapsed.

Worcester's definitions of "within" correspond with Webster's, quoted in the Alabama case, *supra*.

The Imperial Dictionary gives the first meaning, in the interior—as applicable to *space*; also it adds: "2. in the limits," etc., as applied to *place*; "as applied to *time*, not later than," etc.

Thus the lexicographers agree in applying the strictly inclusive meaning of the word to *space*, and not to *time*.

2. Whatever this Court may conclude as to the construction of this act as an original proposition, it should not now construe it differently from the construction given to it for many years by all parties interested in its administration.

The evidence is conclusive that for years following the passage of the Act of 1864 (and Section 2931 of the Revised Statutes is identical), it was construed by the Treasury Department and all the officers charged with its administration, as being satisfied by a protest made at any time prior to ten days after the liquidation of the entry to which such protest might apply.

In other words, the construction in practice was the same as that we have heretofore contended for, viz.: that a protest made at any time after the making of an entry and prior to a period ten days from the final liquidation by the proper customs officers of the duties upon that entry, was a protest made in due time within the provisions of this act.

This being so, this Court has no right to give the act in question any other construction.

I say it has no right, because to do so would work the grossest injustice. Relying on the instructions of the Treasury Department and its construction of the act, these plaintiffs and many others have filed their protests prior to the liquidation of the entry and to now hold such not to be properly made will deprive such parties of property rights that would otherwise be theirs.

In the language of this Court, Mr. Justice FIELD, speaking its opinion in a very recent case:

"This construction of the department has been followed for many years, without any attempt of Congress to change it, and without any attempt, as far as we are advised, of any other department of the Government to question its correctness, except in the present in-

stance. The regulation of a department of the Government is not, of course, to control the construction of an act of Congress when its meaning is plain. But when there has been a long acquiescence in a regulation, and by it rights of parties for many years have been determined and adjusted, it is not to be disregarded without the most cogent and persuasive reasons."
Robertson vs. Downing, 127 U. S., 607, 613.

There has been a long acquiescence in the construction contended for by the plaintiffs in error, and we submit there is no real reason in the nature of the case, much less a "cogent and persuasive" reason why such construction should not be followed.

Not only was this the rule of the department down to the time of the filing of the protests in question, but as late as January 23d, 1886, the department said:

"You will hereafter, beginning February 1, 1886, be governed by treasury decision (3736) of September 30, 1878, and the opinion of the Attorney-General of October 30, 1878, in the execution of Section 2931 of the Revised Statutes, and you will not treat as valid any notice of dissatisfaction served or lodged before the work of ascertainment and liquidation has been fully completed, as defined by Article 359 of General Treasury Regulations of 1884. You will also take special care that Article 362 of the Regulations is faithfully executed, and you are expected, so far as practicable, to examine protests in person whenever new questions shall be presented therein, and to carefully revise the doings of the liquidating clerks, which are distinctly specified as unsatisfactory. You will also hereafter, when reporting to this department on appeals, give the date of liquidation of the original entry and the day when the protests were served on you." (Record, fol. 55.)

And again on October 15th, 1887, the Secretary of the Treasury said:

"The applicants allege that the requirements of law as to protest and appeal were complied with in each

case, and the statements contained in the memoranda submitted by them seem to confirm this claim, the importations appearing to have been made in 1883 and 1884, prior to the decision of the department requiring protest and appeal to be filed subsequent to the liquidation of the entry. * * * In view of the uncertainty in regard to the proper construction of the law upon the subject which prevailed prior to department's letter of January 23, 1886 (synopsis 7,386), and the conflicting opinions of the courts and the law officers of the Government and the uniform practice of the department in receiving these protests without question, which practice was expressly established by the opinion of the solicitor of the treasury and department's letter of May 2, 1885 (synopsis 6,895), it was not intended that in cases where the importer had acted in good faith and the only question which could be raised in regard to his right to a refund was that of the premature filing of the protest he should be denied what would otherwise be due him and which has been uniformly allowed heretofore in other similar cases (Record, fols. 56, 57).

See further upon this point Hahn vs. United States, 107 U. S., 402, 406, in which the Court refer with approval to United States vs. Pugh, 99 U. S., 265, quoting:

"'In the case of a doubtful and ambiguous law, the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect (Edward's Lessee vs. Derby, 12 Wheat., 210),' and where this Court refused to interfere with such construction after it had been acted upon for a long time."

See also Edwards vs. Darby, 12 Wheat., 206.
United States vs. State Bank of North Carolina, 6 Pet., 29.
United States vs. McDaniel, 7 Pet., 1.
Surgett vs. Lapice, 8 How., 48.
Smythe vs. Fiske, 23 Wall., 374.
United States vs. Moore, 95 U. S., 760.
United States vs. Pugh, 99 U. S., 265.

Swift Co. vs. United States, 105 U. S., 691, 695.
United States vs. Hill, 120 U. S., 169, 182.
United States vs. Philbrick, 120 U. S., 52, 59.
Brown vs. United States, 113 U. S., 568, 571.
See also Burge vs. Smith, 27 N. H., 332.

II.

The third error assigned is based upon the exclusion by the Court of evidence as to the practice of the department and as to protests filed before liquidation subsequent to the date of the last entry in this case.

The exception to this ruling rests upon the authorities cited under the last preceding point.

If the construction of a given statute by this Court is to be effected by the action of officers charged with its execution then we are not limited to the particular time that the plaintiffs acted upon such construction.

It is as important for this Court to know that the Treasury Department continued from 1873 until 1886, the same construction that it had given the statute from 1864 to 1873, and that TO-DAY it is refunding excessive duties paid under protests filed in the same manner as the protests in this case were filed.

III.

The fourth and fifth errors assigned are governed by similar principles.

If admisssible and important to show the practical construction given the statutes in question, it was equally admissible and important to show how far reaching such construction had been and how much it had affected property rights.

In the language of the Court in New Hampshire, in Burge vs. Smith, *supra:*

"To disturb a custom so long prevalent and so general as this appears to be, whatever doubts we may have of its reasonableness or propriety, would unavoidably unsettle the titles of great numbers of persons, and must be attended with great injustice to those holders of real estate who have paid the full price of unincumbered property, and who regard themselves, and are generally considered, as perfectly secure from any claim of dower.

"If evil is supposed to arise from the practice, it is for the Legislature to provide a remedy, which shall look to the future without disturbing the past. We are not aware of any considerable practical inconvenience which has resulted from this local usage, beyond the liability to mistake, along the borders of the neighboring States, where a different rule prevails" (27 N. H., 338).

IV.

The record shows that after the so-called decision as to protest before liquidation in Watt vs. United States, 15 Blatchford, 29 (I say so-called because, upon a careful examination it will appear that this question was not involved, and that whatever the late Chief-Justice said upon this point was said by way of argument and not as a decision of a contested question), another and later decision was rendered upon the exact point in issue in the Circuit Court in New York in the case of Kayser vs. Arthur. This case is referred to in the department circular of July 8, 1879, to be found on page

20 of the Record, and thereafter the action of the department was conformed to its former practice.

Although this case is not reported, I am able to give the facts of it and the opinion of Judge SHIPMAN, before whom it was tried.

The entries were two in number, one by the steamer "Celtic" dated September 15, 1873, and the entry being for immediate consumption, the duties were paid on the 17th of the same month, the entry being stamped as finally liquidated on the 6th of November, 1873; protest in this case was received at the Custom House on the 1st of October, 1873, the importer noting at the foot of said protest that the entry was "*not* liquidated." The other entry was also for immediate consumption, was by the "Donau" October 10th, 1873. This entry was stamped as liquidated the same date as the other, November 6th, 1873, and the protest was received at the Custom House on the 24th of October, 1873.

Judge SHIPMAN said:

"When the Collector had officially and in writing upon the entry ascertained and liquidated the duties upon the goods named in such entry at a certain rate of duty, a protest within ten days after such ascertainment and liquidation and an appeal within thirty days thereafter are good and valid as to time, although subsequently to the date of such ascertainment, liquidation, appeal and protest the Collector revises the amount of such liquidation and makes a final ascertainment and liquidation at the same rate of duty.

"The first ascertainment and liquidation is in fact a final one as to rate.

"A protest and appeal within the statutory time after the final liquidation are also good and valid.

"The uniform practice in this port for many years as to time of protest and appeal in conformity with this rule which practice has been sanctioned by all the officers of the Government is of much importance in the decision of this question."

V.

The action of the Collector and of the Treasury Department in respect to the particular protests upon each of the entries in this case is such as to estop the defendants in error and the Government from now saying that they were prematurely filed.

They were accepted as in due time under the statutes. The report from the Custom House transmitting the protest and appeal to the Department, stated that the provision of law in this respect had been complied with. The Department entertained the appeal, and confirmed the action of the Collector (Record, p. 9).

And it appeared uncontradicted that where a protest was deemed to have been filed out of time, the appeal, as a rule, was not entertained by the Department (Record, fol. 26).

If the plaintiffs had been informed that their protest was premature there would have been ample time for them to have repeated the physical act of lodging it with the Collector after his clerks had stamped the entry as liquidated.

VI.

To sum up and restate the argument before the decision in Cary vs. Curtis, 3 How., 236, this Court had sustained a common law action against a Collector who had made an unlawful exaction of duties where a common law protest had been made to him at the time of the exaction or before he had paid over the duties so unlawfully exacted.

In 1845 the right of action *in assumpsit*, held in Cary vs. Curtis to have been taken away by the Act of 1839, was restored by Act of Congress. That act, however, required a protest to be made *in writing*, and signed by the claimant, at or before the payment of the duties.

The provisions of the Act of 1845 remained in force until the passage of the Act of 1864 (13 Stats., 214), by which the decision of the Collector on the entry of any merchandise as to rate and amount of duties should be final and conclusive, unless the owner or consignee should *within ten days after* the ascertainment and liquidation of the duties give notice in writing to the Collector *on each entry* if dissatisfied, &c.

An examination of the state of the law in 1864 has shown that prospective protests, so called, were allowed, and that a party having filed a protest upon one entry with the Collector could successfully claim that it applied to all similar importations thereafter made with the same Collector.

This was regarded as an evil, and to remedy it the Act of 1864 was passed requiring the importer to do something as to each of his entries. It extended the time within which this something might be done, and substituted for the common law protest theretofore valid a notice of dissatisfaction.

The Statute was remedial both to the Government and the importer, and as we have argued fixed a period of time within which this notice might be given, viz.: the time when the entry was first made, up to and including the tenth day from the final adjustment of the duties by the collector. That the true intent and meaning of the Statute was that at any period within these two dates within which the importer found cause of dissatisfaction with the action of the collector in respect to his entry, the Statute gave him the right and privilege of stating such dissatisfaction in writing to the collector, and unless such action was reversed or modified by the collec-

tor, or on appeal such notice gave the right of action provided for in said statute.

Further; this view of the true construction of the Act of 1864 is fortified, and its construction should be controlled by the unquestioned and unvarying action of the officers of the Treasury Department and the Customs from the time of its passage until 1878, a period of fourteen years. That their interpretation of this statute consonant with that now claimed by the plaintiffs in error was, although questioned in 1878, soon returned to and continued to be the recognized rule of the Department for eight years longer, and was in good faith acted upon by these and other plaintiffs. Moreover, down to the present time, the Secretary of the Treasury has continued to make refunds of illegally exacted duties upon protests filed at a period of time with reference to the entries and their liquidation exactly similar to those in the present case.

It is therefore submitted that upon every reasonable rule of construction, and upon every ground of justice and fair dealing, the ruling of the Court below upon this point should be reversed.

No private individual would hope to maintain in any court of morals or of justice under similar circumstances the contention in behalf of the defendants in error here. No private individual who had accepted protests as due and timely in the manner the Government did these, (*vide* record, p. 9) but would be estopped by such action.

No different rule should be applied, because the Government through its officers took such action.

The judgment should therefore be reversed.

EDWIN B. SMITH,
STEPHEN G. CLARKE,
Of Counsel for Plaintiff's in Error.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1888.

No. 1279.

JOHN M. DAVIES ET AL.

vs.

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Additional Brief in Behalf of Plaintiffs.

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Since filing our original brief we have received that of the Solicitor General.

In view thereof we suggest—

1. That the question presented by the record is as to the timeliness of the protest and not as stated by the Solicitor General at the commencement of his brief.

No exception was taken as to the sufficiency of the appeals, and the decision of the court below was based solely upon the period of time at which the protests were filed.

Moreover, the record shows (p. 9) "that appeals were duly made and suit brought in due time."

So also the ground of the motion of the District attorney

for a verdict was stated to be "that the *protest* in each case appears by the testimony in this case to have been filed before the liquidation of the entry to which it refers, and not within ten days thereafter, as required by law." (Record, fol. 75.)

The argument as to the verbal construction of the statute in respect to protest and in respect to appeal might be a different one. That based upon the construction the statute should now receive, by reason of the construction so long given to the act by officers charged with its execution, is identical as to both papers.

If anything, however, the argument of estoppel is stronger in the case of the appeal. The appellate tribune, the secretary, recognized that the question was properly before him, acted upon that recognition and decided. (Record, p. 10.)

2. It now clearly appears from the Solicitor General's brief that the Government asks the Court to hold as matter of *law* that the collector of the port of New York did not (within the prescribed time) have that notice of dissatisfaction which he confessedly did *then* have as matter of *fact*.

Also as matter of *law*, in contravention of statement of bill of exceptions, that the appeal was equally out of time.

The confession will be found on page 9 of the record:

"I submit the appeal * * * from the *decision* of this office * * * The requirements of the 14th and 15th sections of the act approved June 30, 1864, have been complied with by the appellees.

The appeal is enclosed herewith; *also protest.*"

As matter of fact, then, the *decision* which by the statute

is to be final and conclusive unless protest be made, had, at that date, the date when the above statement was made, been arrived at. The collector had, at that point of time, the protest before him, and had had it from a time prior to the date of liquidation he had stamped upon the entry.

So having it as matter of fact he had had it not only within ten days after but every moment of those ten days, and in spite of it he adhered to his decision, reported his decision to the Secretary of the Treasury, and transmitted the appeal of the importers, theretofore lodged with him for that purpose, in pursuance of regulations made to that end by the Secretary. (Record, p. 23.)

3. We submit there is nothing in the history of the legislation upon the subject of protest, as set out in the Solicitor General's brief, that requires this Court to give the acts in question the new construction now contended for by the law officer of the Government.

Also, the act of 1857, quoted on page 3 of the Solicitor General's brief, has no reference to goods which might be subject to some rate of duty, or when the importer admitted they were liable to some rate. (*Vide* 92, U. S. 453.)

4. While it would be impossible to uphold "prospective protests" without upholding the validity of the protests in this case, a decision against prospective protests would not affect the question here presented.

This is well illustrated by Judge Curtis' opinion in Warren *vs.* Peaslee, 2 Curt., 231, referred to upon the sixth page of the Solicitor General's brief, where the whole reasoning by which prospective protests are concluded to be unauthorized, goes directly to support a protest made as ours were, viz: the

"Two main objects in view; one being to apprise the collector of the objections entertained by the importer *before it should be too late to remove them;* the other, to hold the importer to the objections which he then contemplated," etc. (2 Curt., C. C., 235–'6.)

While this is so we ask the Court, notwithstanding the long argument of the Solicitor General, not to confound the present inquiry with the "prospective" protests, covering all future time and importations, irrespective of changes of collector or in the importing house. (Herman *vs.* Schell, 18 F. R., 791.) The question is entirely different.

The legislation of 1864 provided for a protest *on* each entry. The question here is within what period of time in respect to each entry must such protest be made.

Regardless of the effect of such interpretation upon the utility and object of giving the notice of dissatisfaction and of the construction given to this statute by the Treasury Department in practice the Solicitor General, in his brief, p. 10, asks for the narrowest possible construction that can be given the act.

At the top of the next page (11) of his brief he bases his argument upon the erroneous assumption, contradicted by the record (p. 30, fol. 62, cross-examination), that there can be no decision with which an importer can be dissatisfied until liquidation; whereas the testimony to which we refer states the necessary order of events—that the *rate* is *first* determined before a computation of amount is entered upon, and Revised Statutes, section 2931, begins by speaking of the collector's decision as to "rate and amount."

Had the Legislature desired to be as emphatic as he imagines (p. 11) it would have been just as easy to have

made the section "after the ascertainment," etc., "and within ten days therefrom."

On this same page he also refers to Ullman *vs.* Murphy. We again ask the court to remember that this is not a question of prospective protests as considered in that case, and also that Judge Woodruff's decision was based on the phrase "on each entry," and not on the clause now under discussion. So far as that decision has weight here it must be with us.

6. The *decision* in Westray *vs.* United States (18 Wall, 322), is not the statement quoted at top of page 12 of the Solicitor General's brief. In that case Westray & Co. *never* protested nor appealed at *any time.*

The *whole* subject of discussion there was whether or not the merchants were entitled to a notice of the collector's liquidation before being bound thereby, or called upon to protest against it.

It was declared they were not, and the whole period of ten days after liquidation having passed without any protest having ever been made, the ascertainment was held conclusive in suit upon a bond to pay the duties *as ascertained.*

The language of the opinion shows that the Court held the liquidation to be synchronous with the *entry,* and proceeded upon this assumption.

"As we have remarked, the liquidation of the duties is required by the law to be made when the entries are made."

7. As to the several Treasury circulars quoted by the Solicitor General (pp. 13, 14), it appears that while they instructed collectors that protests must be "within the time prescribed," they understood that those filed any time (after

been recognized, both by the customs officers and by this Department, as valid if filed *at any time* before the expiration of the time mentioned in the section of law cited."

In conclusion, notwithstanding the Solicitor General's argument, we insist that Watt *vs.* United States did not decide the question here discussed; that the question actually decided in that case has since been settled differently by this Court, the late Chief Justice concurring in such practical reversion of the Watt case, and that it is not now an authority in this Court.

We go further and insist that if it did decide all that has been claimed for it this Court should not follow such decision, but should have regard to its own more recent utterances.

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BRIEF FOR DEFENDANTS.

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BRIEF FOR DEFENDANTS.

The question presented in this record is, is a protest and appeal filed before "the ascertainment and liquidation of the duties" upon an importation of merchandise such a compliance with the requirements of section 2931, Revised Statutes, as will sustain an action by an importer to recover from the collector the excess over the alleged legal duties demanded and received by the collector?

The statutes material to be considered in the determination of this question, in their chronological order, are as follows:

The Act of the 26th of February, 1845 (5 U. S. Stats., 727):

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That nothing contained in the second section of the act entitled "An act making appropriations for the civil and diplomatic expenses of the Government for the year one thousand eight hundred and thirty-nine, approved on the third day of March, one thousand eight hundred and thirty-nine," shall take away, or be construed to take away, or impair the right of any person or persons who have paid, or shall hereafter pay, money as and for duties under protest, to any collector of the customs, or other person acting as such, in order to obtain goods, wares, or merchandise, imported by him or them, or on his or their account, which duties are not authorized or payable in part or in whole by law, to maintain any action at law against such collector, or other person acting as such, to ascertain and try the legality and validity of such demand and payment of duties, and to have a right to a trial by jury, touching the same, according to the due course of law. Nor shall anything contained in the second section of the act aforesaid be construed to authorize the Secretary of the Treasury to refund any duties paid under protest; nor shall any action be maintained against any collector, to recover the amount of duties so paid under protest, unless the said protest was made in writing, and signed by the claimant, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof.

The *5th section of the Act of the 3d of March*, 1857 (11 U. S. Stats., 195):

> SEC. 5. *And be it further enacted*, That on the entry of any goods, wares, and merchandise imported on and after the first day of July aforesaid, the decision of the collector of the customs at the port of importation and entry, as to their liability to duty or exemption therefrom, shall be final and conclusive against the owner, importer, consignee, or agent of any such goods, wares, and merchandise, unless the owner, importer, consignee, or agent shall, within ten days after such entry, give notice to the collector, in writing, of his dissatisfaction with such decision, setting forth therein distinctly and specifically his grounds of objection thereto, and shall, within thirty days after the date of such decision, appeal therefrom to the Secretary of the Treasury, whose decision on such appeal shall be final and conclusive, and the said goods, wares, and merchandise shall be liable to duty or exempted therefrom accordingly, any act of Congress to the contrary notwithstanding, unless suit shall be brought within thirty days after such decision for any duties that may have been paid, or may thereafter be paid, on said goods, or within thirty days after the duties shall have been paid in cases where such goods shall be in bond.

Section 14 of the Act of the 30th of June, 1864 (Rev. Stat., § 2931):

> On the entry of any vessel, or of any merchandise, the decision of the collector of customs at the port of importation and entry, as to the rate and amount of duties to be paid on the tonnage of such vessel or on such merchandise, and the dutiable costs and charges thereon, shall be final and conclusive against all persons interested therein, unless the owner, mas-

ter, commander, or consignee of such vessel, in the case of duties levied on tonnage, or the owner, importer, consignee, or agent of the merchandise, in the case of duties levied on merchandise, or the costs and charges thereon, shall, within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, as well in cases of merchandise entered in bond as for consumption, give notice in writing to the collector on each entry, if dissatisfied with his decision, setting forth therein, distinctly and specifically, the grounds of his objection thereto, and shall, within thirty days after the date of such ascertainment and liquidation, appeal therefrom to the Secretary of the Treasury.

The decision of the Secretary on such appeal shall be final and conclusive; and such vessel, or merchandise, or costs and charges, shall be liable to duty accordingly, unless suit shall be brought within ninety days after the decision of the Secretary of the Treasury on such appeal for any duties which shall have been paid before the date of such decision on such vessel, or on such merchandise, or costs or charges, or within ninety days after the payment of duties paid after the decision of the Secretary. No suit shall be maintained in any court for the recovery of any duties alleged to have been erroneously or illegally exacted, until the decision of the Secretary of the Treasury shall have been first had on such appeal, unless the decision of the Secretary shall be delayed more than ninety days from the date of such appeal in case of an entry at any port east of the Rocky Mountains, or more than five months in case of an entry west of those mountains.

The goods on which duties were collected, for which refund is claimed in this case, were entered between July 31 and September 11, 1873. The protests were

severally filed between August 5 and September 17, 1873. The appeals were taken at the dates of the protests. The protests were filed with the collector and appeals taken prior to the date of the liquidation of the duties. (Rec., pp. 4, 9, and 34.)

In the case of *Elliot* vs. *Swartwout* (10 Peters, 137), it was ruled an importer who had protested, before the money was paid into the Treasury, against payment of excessive duties, and had paid the duties in order to obtain possession of his goods, could recover against the collector, in the common-law action of assumpsit for money had and received, the excess paid beyond the amount of the legal duties.

The second section of the act of the 3d of March, 1839 (5 U. S. Stats., 348) required the collector to pay the money into the Treasury notwithstanding the protest of the importer. At December term, 1844, of the Supreme Court of the United States, in the case of *Cary* vs. *Curtis* (3 Howard, 236), it was ruled that the act of 1839 deprived the importer of his common-law remedy. That case gave rise to the act of the 26th of February, 1845, above quoted, which, in lieu of the common-law remedy, provided a statutory one. To this statutory remedy a condition precedent was affixed that the claimant must protest in writing "at or before the payment of such duties."

Also that the protest must set forth "distinctly and specifically the grounds of objection to the payment."

This statute only established the last limit of the time before which the protest should be made, which was that it should be before the payment by the importer. It cut off the common-law right of protest during the time that

intervened between the final payment to the collector and the payment by him into the Treasury. As this statute did not declare how long before the payment the protest might lawfully be made, the case of *Marriott* vs. *Brune*, decided at December term, 1849 (9 Howard, 619), sustained a protest which was made before the importation as to a part of the goods on which excessive duties had been collected. Under the act of 1845, as interpreted in that case, prospective protests were frequently adopted and sustained; but not uniformly, for, in 1855, in the case of *Warren* vs. *Peaslee* (2 Curtis 231), Judge Curtis, in discussing *Marriott* vs. *Brune*, stated—

> The circumstances of that case were very peculiar, and they are relied on by the court as the reason for the decision, at which they manifestly had great difficulty and hesitation in arriving.

He accordingly ruled the usual prospective clause, "you are hereby notified that we desire and intend this protest to apply to all future similar importations made by us," was not a sufficient protest. The act of 1857 differed in its language from the act of 1845 as to the time the protest could be filed, by substituting "unless the owner, importer, consignee, or agent shall, within ten days after such entry, give notice to the collector," for "unless the said protest was made in writing, and signed by the claimant, at or before the payment of said duty."

Such a marked change in the language would have clearly suggested a change in the intent of the law, if the notice, of the act of 1857, referred to the whole of the same subject-matter, that the protest under the act of 1845 did. The act of 1857 said the notice should be filed after

the entry and *within ten days after*. It should have been construed as fatal to the doctrine of prospective protests were it not that, by the language of the act, the notice was limited to "liability to duty or exemption therefrom." The words *within ten days after* fixed a first and last limit to the time of the notice, and also established when the ten days fixed by that statute should commence, and when terminate. Notwithstanding this change in the act of 1857, in March, 1868, Judge Smalley, in the case of *Hutton* vs. *Schell* (6th Blatchford, 48) gave effect to prospective protests filed between July, 1857 and 1861. He did not discuss the limitation "as to their liability to duty or exemption therefrom" in the language, but ruled that because prospective protests had been decided sufficient under the act of 1845, they were effective under the act of 1857, his language being—

> But it is objected that in some of these cases there were no protests filed at the time, or even within the ten days. It is conceded, however, that there had been previous protests filed which claimed to be prospective and continuous, and which the merchants intended to be so. In these protests they say: "You are hereby notified we desire and intend this protest to apply to all future similar importations made by us."
>
> The question of prospective protests has undergone a good deal of discussion in the courts, but it seems to be now well settled, so far at least as this circuit is concerned. The first time that this question arose, whether a protest of this kind, a prospective or continuous protest, was valid as to subsequent importations, was in the circuit court for the district of

Maryland, before Chief Justice Taney, in the case of *Brune* vs. *Marriott*, which appears to have been tried in April, 1849.

* * * * *

The question came up before Mr. Justice Nelson and Judge Betts in this court in November, 1855, in the case of *Steegman* vs. *Maxwell* (3d Blatchford, C. C. R., 365). In the opinion, which was given by Judge Betts, but was the opinion of the full bench, the case of *Marriott* vs. *Brune* is referred to, and the principle is established that a prospective protest of this kind is sufficient to entitle the merchant to recover back duties illegally exacted from him. This ruling has been followed in this court in very many instances, among which is the recent case of *Fowler* vs. *Redfield*, which is not reported, but was decided by Mr. Justice Nelson as lately as December, 1862, and this view seems to have been regarded as the settled rule in this court. Certainly, I have so understood it myself in disposing of this class of cases; and it must be regarded as settled in this circuit, if not throughout the United States.

* * * * *

Another suggestion may and perhaps ought to be made. All the protests in the cases referred to were made under the Act of February 26th, 1845, the language of which as we have already seen, is adopted in the Act of March 3d, 1857, to describe the character of the protest and the circumstances under which it may be made. The act of 1857 does not use the word "protest," but uses another phrase. The protests in the cases referred to having been made prior to the passage of the act of 1857, it is hardly to be supposed that the eminent lawyers in both branches of Congress, when they adopted in the act of 1857 the language of the act of 1845, did not know what con-

> struction the Courts had given to that language. It can not be that the Supreme Court decided this question in 1850, and that this legislation took place six years afterwards in ignorance of such decision. If it had been the design of Congress to change the construction which the Government and the Courts had given to the language used in the act of 1845, it is very natural to suppose that they would have used different language in the act of 1857 in order to indicate such design. (*Vide* pages 54, 55, 56).

From this it appears that it escaped the attention of the learned judge that Congress had used entirely different language in the act of 1857 from that of the act of 1845, as to the time within which the notice should be filed, and that the notice related to a different subject from the protest under the act of 1845. In the case of *Wetter* vs. *Schell* (11 Blatchford, 193), in June, 1873, Blatchford, J., ruled that under the act of 1857 prospective protests were sufficient on the principle of *stare decisis* without considering the difference between the language and subject-matter of the act of 1845 and that of the act of 1857, his language being—

> The question must be regarded as settled in this District that, under the Act of March 3d, 1857, Section 5 (11 U. S. Statutes at Large, 195), as well as the prior act of February 26th, 1845 (5 *id.*, 727), a valid prospective protest against the payment of duties made on a particular importation of merchandise and expressing the intention of the importer that the protest shall apply to all future similar importations made by him, is valid as to subsequent importations of similar merchandise on which like duties are exacted. (*Steegman* vs. *Maxwell*, 3 Blatchford, C. C., R., 365; *Hutton* vs. *Schell*, 6 *id.*, 48.)

The case of *Steegman* vs. *Maxwell* was decided in 1855. The case of *Hutton* vs. *Schell*, above discussed, is the only one cited which was ruled on facts which arose after the act of 1857. The act of 1864, on the interpretation of which this case depends, adopts language which clearly covers the whole of the subject-matter of the protest provided for in the act of 1845.

It provides:

> Unless the owner, master, commander, or consigneee * * * in the case of duties levied on merchandise or the costs and charges thereon, shall, within ten days after the ascertainment and liquidation of the duties by the proper officer of customs, as well in cases of merchandise entered in bond as for consumption, give notice in writing to the collector on each entry if dissatisfied with his decision.

The clause of the act of 1857 "as to their liability to duty or exemption therefrom," does not appear in this act.

It in terms provides the notice must be given within ten days. It means, as we contend, that it can not legally be given either before or after the ten days fixed, but must be given within them. Unlike the act of 1845, it establishes both a first and last limit to the time. It declares those ten days shall commence after the "ascertainment and liquidation." It establishes that this rule shall apply alike to merchandise, whether entered "in bond or for consumption," and it enacts the notice shall be given to the collector "on *each* entry." Its intent was to fix a

simple, reasonable, and uniform general rule. The notice referred to is the protest of the prior act. It is only to be given when the importer is "dissatisfied with his [the collector's] decision." The protest alleging that an act is wrong can not reasonably be made before the act is done. The importer can not be presumed to know what the decision of the collector is until after the collector has decided.

This clause was inserted clearly to emphasize the rule that the protest must be after the ascertainment and liquidation as previously prescribed in the section. That the notice should be given on *each* entry was inserted to emphasize the intent that there should be no more prospective protests. The very same language, "within —— days after," is used in the section with reference to the notice, the appeal, and the bringing of the suit. The ascertainment and liquidation is made by this act the common starting-point in time, for both the protest and appeal. The same language is applicable to both. The appeal to the Secretary of the Treasury could as well be taken before the ascertainment and liquidation, as the notice of protest be given to the collector. In this case the protests and appeals were taken at the same time (Rec., p. 7). Woodruff, J., in the case of *Ullman* vs. *Murphy*, decided in November, 1873 (11 Blatchford, 354), after a very full and careful discussion of the cases bearing on prospective protests, ruled that since the act of 1864 a prospective or continuing protest is not valid.

In 1873 Justice Strong, delivering the opinion of this court in the case of *Westray* vs. *United States* (18 Wallace,

322–330), in which case the question decided arose under the act of 1864, ruled—

> The limitation of the right to complain or to appeal commences with the date of the liquidation, whenever that is made. No notice is required, but the importer who makes the entries is under obligation to take notice of the collector's settlement of the amount of duties.

At the October term, 1875, of this court, in the case of *Barney* vs. *Watson* (92 U. S., 453), Mr. Justice Bradley rules that the act of 1864 repealed the act of 1845, and distinguishes between the act of 1857 and that of 1864, as follows:

> The act of 1857, which was erroneously supposed to govern the case, did not relate to a decision upon the rate and amount of the duties to be charged, but to the decision of the collector whether the goods were on the free list or not.

In the case *Watt* vs. *United States* (15th Blatchford, 29), decided on the 1st of July, 1878, Chief-Justice Waite delivered an opinion in which he interpreted the language of the act of 1864, "after the ascertainment and liquidation of the duties," and ruled that the protest and appeal must succeed the liquidation, and that the liquidation referred to must be the final liquidation. This case is referred to and commented upon without disapproval in the case of *U. S.* vs. *Schlesinger* (120 U. S., 114).

On the 31st of October, 1878, Attorney-General Devens rendered an opinion (16th Opinions, 198) to the Secretary of the Treasury, in which he adopted the doctrine announced in the case of *Watt* vs. *United States;* and also maintained

that it was not within the power of the Secretary of the Treasury to waive the requirements of the law, and recognize a protest which had been filed before the liquidation of the duties.

On the 1st of July, 1864, the day after the passage of the act, the Secretary of the Treasury *ad interim* issued an order calling attention to its 14th and 15th sections, suggesting the change it wrought in the law as to protests and appeals, and concluded—

> No protest can be received by a collector if not made according to and within the time prescribed by this act, and no appeal will be entertained at this Department unless made in accordance with the provisions of this act (Rec., p. 22).

On the 10th of May, 1867, Secretary McCulloch issued another circular of similar purport, with more specific instructions as to details of administration, and directed that—

> The notice of dissatisfaction or protest referred to in the section before cited must in all cases be presented to the collector within ten days, and the appeal to the Secretary be taken within thirty days after notice of the ascertainment and liquidation of the duties, as herein provided. (Rec., p. 23.)

The same rule is indicated in a letter of the Secretary to the collector at Wilmington, January 14, 1873. (Rec., p. 32.)

On the 15th of August, 1875, Acting Secretary Burnam issued a circular reciting sections 2931 and 2932,

Revised Statutes, enforcing former circulars of the Department, and specifically directing that—

> In reporting upon such appeals, as, also, upon those originally filed with the customs officers, they will be careful in all cases to state whether protest and appeal have been taken within the time required by law, and to see that the date of liquidation of the entries is endorsed upon each appeal before transmission to the Department. (Rec., p. 25.)

On the 16th of March, 1877, Assistant Secretary French, in a letter addressed to James C. Kohlsaat's Sons, New York, reiterated the same doctrine, concluding his letter as follows:

> In reply you are informed that section 2931, Revised Statutes, requires that protests must be lodged with the collector within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, and that the Department has uniformly held that the ten days specified in said section include intervening Sundays and holidays. (Rec., p. 33.)

On the 30th of September, 1878, Assistant Secretary French issued an order emphasizing the requirement that the protest and appeal must be after the final liquidation, referring therein specifically to the case of *Watt* vs. *United States*, and directing the recognition and observance of the rule in it laid down (Rec., pp. 15 and 16), closing his letter as follows:

> The Department recognizes this rule as a proper construction of the law now in force. This rule moreover would seem to be a proper one, because, until the entry has been liquidated, which constituted

> the adjustment of the duties by the collector, there is no official act of the collector performed against which a protest and appeal may properly be taken.
>
> The practice of your office in regard to recognizing protests and appeals will conform to the views thus laid down.

On the 8th of July, 1879, Assistant Secretary French issued a circular reversing his former one, and all those that had preceded it since the passage of the act of 1864, which concluded as follows:

> It is, therefore, ordered, that protests and appeals filed at any time prior to the expiration of the ten and thirty days respectively specified in section 2931 of the R. S. are to be regarded by customs officers and this Department as complying with the requirements of the law as to time. (Rec., p. 20.)

This reversal of all the previous instructions of the Department was made in recognition of the case of *Kayser* vs. *Arthur*, referred to in it, which does not seem to be reported.

In May, 1885, Assistant Secretary Fairchild, by a circular issued in pursuance of an opinion of the Solicitor of the Treasury, re-established the rule that a protest must succeed the ascertainment and liquidation, concluding his letter as follows:

> The Department adopts this opinion; but, in order not to work unnecessary injustice, you are instructed to give public notice of this decision, and that protests and appeals filed in connection with the original entries made on and after the 10th instant must be filed in the manner herein prescribed. (Rec., p. 26.)

On the 23d of January, 1886, Secretary Manning repeated the same doctrine (Rec., p. 27), using the language:

> And you will not treat as valid any notice of dissatisfaction served or lodged before the work of ascertainment and liquidation has been fully completed, as defined by article 359 of General Treasury Regulations of 1884.

On the 15th of October, 1887, Assistant Secretary Maynard, while recognizing the true rule to be, for cases arising after the 1st of February, 1886, as it was laid down by the earlier decisions, waives the rule as to importations prior to that date (Rec., p. 27).

Treasury Regulation of 1884, No. 359, provides:

> ARTICLE 359. The rights of importers in certain cases depend upon protest and appeal within a specified time, "after ascertainment and liquidation of duties;" and they should be notified of the time at which the duties on their respective entries are ascertained and liquidated. Rev. Stat., § 2931; Circular of May 10, 1867, (Rec., p. 34).

We contend from this review of the action of the Department of the Treasury, that it appears, with the exception of the circular of Assistant Secretary French, of the 8th of July 1879, which was issued after the importations in these cases, the views of the Department legally expressed, so far as they appear in the records, recognized the true interpretation of the statutes to be that the protest must be filed after the final ascertainment and liquidation of the duties. The protests or notices in these

cases were in defiance of the legally-established rule of administration at the time of the entries.

That the act of 1864 established a different and inconsistent rule as to the time when protest must be filed, from that provided in the act of 1845, is sustained by the revision of the statutes. As the revision was first published, the clause of the act of 1845, "In writing and signed by the claimant or his agent, was made and delivered at or before the payment setting forth distinctly and specifically the grounds of objection to the amount claimed," was carried into section 3011. On the 27th day of February, 1877 (19 U. S. Statutes, 247), an act was passed "for the purpose of correcting errors and supplying omissions in the act entitled 'An act to revise and consolidate the statutes of the United States in force on the first day of December, Anno Domini one thousand eight hundred and seventy-three,' so as to make the same truly express such laws, the following amendments are hereby made therein." In that act the following clause appears:

> Section three thousand and eleven is amended by striking out all after the word "protest" in the eighth line, and adding the words "and appeal shall be taken as prescribed in section twenty-nine hundred and thirty-one."

This is equivalent to a declaration that the incorporation of the language of the act of 1845 into the Revised Statutes, after the passage of the act of 1864, was erroneous.

In interpreting the effect of the act of the 18th of February, 1875, whose object was identical with that of the

act of the 27th of February, 1877, this court, in the case of *United States* vs. *Auffmordt* (122 U. S., 210), ruled—

> Its sole object was to correct errors and supply omissions in the text of the Revised Statutes, as its title indicates, so as to make the same truly express the statutes in force on the first of December, 1873, and it made a special reference to the printed volume of the Revised Statutes. It was, in no respect, new legislation, nor a new law enacted to take effect from the date of its passage in such wise as to alter any enactment made since the passage of the Revised Statutes.

If the language of section 3011 as it first appeared in the revision had not been regarded by Congress as inconsistent with the act of 1864, it would not have been stricken out as an error in 1877.

The plaintiffs introduced a large number of witnesses to prove that, in New York, protests filed under the act of 1864, prior to the ascertainment and liquidation, had been recognized, and refunds made thereon.

This evidence, if offered to prove as facts the time when the protests were filed and what was the official action thereon, was incompetent, as both of these facts were evidenced by writings, which was the best evidence.

If it was offered to prove a particular custom, it was insufficient, for a particular custom, to be obligatory, must be shown to be "immemorial, continuous, peaceable, reasonable, certain, compulsory, and consistent."

If it was offered to prove that the law was interpreted in a given way by local customs officers, if that interpretation was inconsistent with the true interpretation of the

law, as established by departmental circulars and judicial decisions, it was incompetent. In any event, it was immaterial, for the officers could not by erroneous administration change the law nor bind the Government by their acts or declarations to a waiver of legal requirements. (*Whitesides* vs. *United States*, 93 U. S., 257.)

G. A. JENKS,
Solicitor-General.